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Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 4

JIM GARRISON,

Appellant.

versus

STATE OF LOUISIANA,

Appellee

On Appeal from the Supreme Court of Louisiana

BRIEF FOR APPELLANT

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 400

JIM GARRISON,

Appellant

versus

STATE OF LOUISIANA,

Appellee

BRIEF FOR APPELLANT

Opinions Below

The opinion of the Supreme Court of Louisiana (R 118) is reported at 244 La. 787, 154 So.2d 400. That of the Criminal District Court for the Parish of Orleans (R 610), the court of first instance, has not been reported.

Jurisdiction

This is a criminal prosecution for defamation, brought against appellant pursuant to Section 47 of Title 14 of the Louisiana Revised Statutes.

The judgment of the Supreme Court of Louisiana was rendered on June 4, 1963. R 118, 173. Rehearing was denied, and the judgment became final and executory, on June 28, 1963. R 187. The notice of appeal to this Court was filed in the Supreme Court of Louisiana on July 11, 1963. R 190.

This Court has jurisdiction of the appeal under 28 USC 1257(2).

Statutes Involved

The appeal involves the validity, under the First and Fourteenth Amendments to the Constitution of the United States, of the following Louisiana constitutional and statutory provisions as applied to appellant under the particular facts of this case:

1—Constitution of Louisiana, Article 7, Section 41, 2 West's Louisiana Statutes Annotated—Constitution, 382:

> "All (criminal) cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury."*

2—Louisiana Revised Statutes, Title 14, Sections 47 and 48, 9 West's Louisiana Statutes Annotated—Revised Statutes, 280:

> "§47. Defamation
>
> "Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:

* Section 340 of Title 15 of the Revised Statutes of Louisiana provides: "Every misdemeanor shall be triable by the judge without the intervention of a jury"; and section 341 defines a misdemeanor as "an offense, the punishment of which is necessarily a fine or imprisonment in the parish jail or both".

"(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or

"(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or

"(3) To injure any person, corporation, or association of persons in his or their business or occupation.

"Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year, or both."

"§48. Presumption of malice

"Where a non-privileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown.

"Where such a publication or expression is true, actual malice must be proved in order to convict the offender."

Question Presented

Appellant, District Attorney for the Parish of Orleans, made a statement to the press in reply to a statement, critical of appellant, given to the press by a recently retired Judge of the Parish Criminal Court. Appellant's statement charged the Judges of the Court with

responsibility for a large backlog of untried criminal cases, with enjoying excessive vacations, with lack of concern at the paucity of trials for commercialized vice in past years, with lack of sympathy toward appellant's use of investigators to uncover vice conditions, with blocking appellant's investigations of such conditions, with "misrepresentation of facts", and that the Judges' attitude "raises interesting questions about the racketeer influences on our eight vacation-minded judges".

The holding of the Supreme Court of Louisiana, in affirming appellant's conviction of criminal defamation for making the foregoing statements, that the First Amendment to the Constitution of the United States, as embodied in the Fourteenth, does not render invalid the State's criminal-defamation statute, even when applied as a sedition act for libel of the Judges, in a prosecution in which trial by jury and application of the clear-and-present-danger test were denied, presents the following question for decision by this Court:

> Whether the First and Fourteenth Amendments to the Constitution of the United States permit the State of Louisiana, under any circumstances, so to apply its constitutional provision for trial of misdemeanors without a jury, and its statutory provision making criminal defamation a misdemeanor, as to convict and sentence a parish District Attorney, without trial by jury, for publication of a statement critical of the official conduct of the Judges of the parish Criminal Court, especially when the District Attorney's statement plainly involved

no clear and present danger, either to preservation of the peace or to the proper administration of justice.

Statement of the Case

Following his induction into office as District Attorney of the Parish of Orleans (coterminous with the City of New Orleans) in May 1962, appellant made intensive efforts to reduce the accumulated backlog of cases he found awaiting prosecution, and embarked also on a campaign of investigation and prosecution of commercial vice conditions in New Orleans' Bourbon and Canal Street districts. R 289, 300, 371, 459, 475.

Under Louisiana law (Revised Statutes, Title 15, Section 571.11), all fines and forfeitures imposed in criminal cases in Orleans Parish are deposited by the District Attorney in a special account. These funds are to be used, in his discretion, to defray the expenses of the Criminal District Court of the Parish, and of the District Attorney's office. The statute provides further that "no money shall be paid out of this fund except upon motion by the district attorney of Orleans Parish and approval by a judge of the criminal district court of Orleans Parish".

Since re-enactment of the cited statute in 1959, substantially in its present form, such funds had been used, in part, to pay for investigations by the District Attorney's office; individual Judges had always approved disbursements from the special account for this purpose; and in the opening stages of appellant's

investigation of vice conditions, individual Judges had approved his use of the fund to defray the costs thereof. R 376, 477, 481-82.

In August 1962, however, the Judges announced that no further disbursements from the fund would be approved until October, when all of the Judges would have returned from summer vacation, and a new system for administering the fund could be established. R 315-16.

On October 4, 1962, the Judges met *en banc*. On the afternoon of that day, appellant was invited to join the meeting. When he arrived, he was advised that although the relevant statute provides, as stated, for disbursements from the special fund on "approval by a judge" of the Court, no further motions for such disbursements would be approved except with the concurrence of not less than five of the eight Judges. R 294-95, 492-93.

On October 26, 1962, the Judges again met *en banc*, and determined that no further disbursements for investigations by the District Attorney's office would be approved (R 385-86), and none have been approved since October 4, 1962 (R 489).[1]

[1] In testifying as witnesses at the trial, the Judges stated (as summarized by the Trial Judge in the case of one of their number), that they "did not believe the statute authorizing the use of the funds in the manner used by the Defendant was constitutional" (R 617); but the Trial Judge concluded: "I do not believe this was the motivating influence causing the Judges to adopt the rule that they did" (R 629).

On November 1, 1962, a recently retired Judge of the Court made a statement to the press, critical of appellant. R 308.

The following day, appellant, when asked by reporters whether he had any comment on this statement, made the remarks which are at issue in this case. R 198-203. Those portions of appellant's statement which may fairly be considered to constitute the gravamen of the complaint ultimately made, excluding repetitions, are as follows:

> "Apparently the judges have called in all their reserves. Whatever their resulting statement turns out to be, I doubt if the facts will be much more accurate than those in Judge O'Hara's statement. I will cite some glowing examples of misrepresentation of facts. . . . .
>
> "(After making reference to the backlog of untried criminal cases in Orleans Parish, appellant continued): Inasmuch as the judges have been the only continuing caretakers of the criminal courts operation over the years, it is pretty obvious where the real responsibility lies for the revised backlog of untried cases. District attorneys come and go every four years but the judges and the backlog always seem to be here . . .
>
> "(After referring to Judge O'Hara's charge that the District Attorney's investigators were not made available in court, appellant continued): Obviously this is nothing more than a petulant slap at our use of investigators to uncover vice conditions in the city—an operation with which the judges have shown a re-

markable lack of sympathy.[2] As a matter of fact, so opposed have the judges been to our vice investigations that they completely blocked us from our Bourbon Street investigation of B-drinking and other forms of vice . . .

"The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street clip joints . . .

"Again the message is clear: 'Don't rock the boat, son. You are not supposed to investigate anything'. This raises interesting questions about the racketeer influences on our eight vacation-minded judges . . .

"Actually, the time for Judge O'Hara to be active in his concern for the district attorney's office was during the preceding four years when there was a complete breakdown of vice prosecution and prosecution of cases in every area. So complete was this breakdown that in the last several years there were almost no trials of any kind for commercialized vice. The judge at no time expressed any concern for the breakdown of the prosecution office . . .

"It is incredible that in this country in 1962 that a man could wait 19 months before his case is disposed of, during which period the judge enjoyed over 300 days' vacation . . ." R 120-24.

[2] One of the Judges admitted, under cross-examination at the trial, that his "father was in the lottery business before he died", and it was shown that his mother had sold this business ten years after the Judge had taken office as such. R 485, 497.

The statement related solely to the Judges' official conduct. At no point did it refer to the private conduct of any of them.

The Attorney General of Louisiana filed a bill of information, charging appellant with defamation of all eight of the Judges. R 26-32. On the same day, the Supreme Court of Louisiana appointed a District Judge from another district as Judge *ad hoc* to try the case against appellant. R 25.

The trial Judge, although holding that "the defamatory statement might not have been issued without some provocation" (R 638), found appellant guilty, and sentenced him to pay a fine of $1,000 or to serve four months' imprisonment. R 634, 638-39, 640. Appellant appealed the conviction and sentence to the Supreme Court of Louisiana, which affirmed. R 118, 173; 244 La. 787, 154 So.2d 400.

Summary of Argument

The historical developments underlying the First Amendment's protection of speech and press, indicate that punishment of defamation as crime is not reconcilable with the purposes of that Amendment's guarantees, especially in light of the fact that criminal-libel statutes, largely fallen into disuse, are being revived as sedition acts to support prosecutions for criticism of public officials.

In his *Report on the Virginia Resolutions* of 1798, James Madison, author and father of the First Amend-

ment adopted only seven years earlier, insisted that the Sedition Act of that year, as "a law inflicting penalties on printed publications, would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say, that no law should be passed, preventing publications from being made, but that laws might be passed for punishing them in case they should be made." 4 *Elliott's Debates* (1836) 572, 596.

This conclusion seems particularly inescapable when the assertedly seditious speech relates to criticism of the official conduct of judges, by another public officer closely involved in the administration of justice.

At all events, this Court's decisions that the First Amendment requires application of the clear-and-present-danger rule in contempt prosecutions for criticism of judges, are equally applicable to criminal-libel prosecutions for criticism of judges.[3]

Logic belies the concept that the constitutional protection established by this Court can be circumvented merely by denominating a prosecution "criminal libel" rather than "contempt of court".

History likewise rejects the acceptability of a different constitutional rule in criminal-libel, from that in contempt, cases; contempt and criminal-libel processes having evolved concurrently in England and in

[3] The term "criminal libel" is used as a generic one in this brief, without reference to traditional distinctions between libel, slander and other forms of defamation.

the American colonies, as governmental weapons for suppression of speech critical of public officials, and having been repudiated by the constitutional developments fostering free speech in America.

Denial of the right to punish criticism of a judge as contempt of court was based, in part at least, on the view that fear of summary trial and punishment by the judge for contempt, was in effect prior restraint violative of the guaranty of free speech. This development secured the right of trial by jury to those charged with defaming magistrates.

This Court's opinion in *Beauharnais vs Illinois* is erroneous, and should be over-ruled; but, even if that opinion is still considered correct, it cannot be construed as removing criticism of government officials from the area of constitutionally-protected speech. Any interest of the State in protecting the reputations of its officers must yield to the higher First-Amendment interest in unfettered discussion of their official conduct.

Provision, in a criminal-libel statute, for the defense of truth without malice, is not a constitutionally valid substitute for the clear-and-present-danger test. Any different conclusion would reduce the First Amendment's guaranties to the protection of speech so inoffensive as to require no protection, leaving unshielded the controversial and dissentient utterances which it was the fundamental purpose of the First Amendment to promote.

Argument

1—*Louisiana's Criminal Defamation Law is Unconstitutional, at Least in its Attempted Application, as a Sedition Act, to Criticism of Judges*

The unconstitutionality of all criminal-libel laws, at least to the extent that their sanctions may be invoked to suppress criticism of officers of government, emerges with clarity from the historical evolution of the First Amendment's guarantees of freedom of speech and of the press.

Criminal-libel process is, historically, the root-evil from which all of our present free-speech principles have really stemmed. In the very opening sentence of his article on *Criminal Libel and Free Speech*, 6 Kansas Law Review 295 (1958), John Kelly said: "The most ancient and direct instrument for the legal control of communications has been the law of criminal libel."

In the words of a recent commentator, "to trace the history of this body of law (free speech) in England, the starting point is the statute *De Scandalis Magnatum* enacted in 1275, which was political in nature and had as its object the preservation of the realm rather than the redress of private wrong. It provided for imprisonment of anyone who should disseminate false news or 'tales' from which discord might result between the king and his people. The statute was re-enacted

in 1378 to include peers, prelates, justices and various other officials . . . . The re-enactments of 1554 and 1559 added 'seditious words' to the statute." Hudon, *Freedom of Speech and Press in America* (1963) 8.

The original design of the statute was to punish "political scandal"; "as the law was administered by the Court of Star Chamber, the security of the state was regarded as imperilled by seditious libel against the rulers of the state." Hudon, *op. cit.*, 8, 10. Later, as the concept that public officials should be exempt from criticism lost ground, a new justification was asserted for criminal-libel actions—preservation of the peace.

By the time of the leading Star-Chamber case, *De Libellis Famosis*, at the beginning of the seventeenth century, both bases for such prosecutions were considered well-established, though sedition—especially as to judges—was still the preferred ground for complaint: "Every libel (which is called *famosus libellus, seu infamatoria scriptura*) is made either against a private man, or against a magistrate or public person. *If it be against a private man it deserves a severe punishment*, for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience: *if it be against a magistrate, or other public person, it is a greater offense*; for it concerns not only the breach

of the peace, but also the scandal of the Government; for what greater scandal of Government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his subjects under him? And greater imputation to the State cannot be, than to suffer such men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice." 5 Coke's Reports 125a, 77 ER 250 (1605).

Following abolition of censorship in seventeenth-century England, criminal-libel trials became the favored governmental weapon, both in the mother country and in the American colonies, against the free dissemination of critical ideas and controversial beliefs.[4] Sedition, rather than breach of the peace, continued to be the acknowledged principal danger guarded against by such actions. See, *e.g.*, the charge to the jury in the *Trial of John Tutchin*, 14 Howell's State Trials 1095, 1128 (1704).

One of the aspects of this persisting use of the criminal-libel proceeding to suppress freedom of expression, was the opportunity it afforded for striking some of the great blows for liberty in Anglo-American history, by the tough-minded juries who acquitted William Penn (on a related charge) and the Seven Bishops in England, and John Peter Zenger in colonial

[4] Chafee, *Free Speech in the United States* (1954) 18, 499-504; Schuyler, *The Liberty of the Press in the American Colonies* (1905) 74-76: 2 May, *Constitutional History of England* (1873) 243; Note: *Constitutionality of the Law of Criminal Libel*, 52 Columbia Law Review 521, 523 (1952).

America, in defiance of contrary directions by the court.[5]

These verdicts were, strictly speaking, extra-legal when rendered, since even after the responsibility for prosecution of libels devolved on the common-law courts, Star-Chamber influence placed severe limits on the jury's role. It was reserved to the court to determine whether the words at issue were punishable, the jury being charged only to find whether the accused had in fact published them. Chafee, *Free Speech in the United States* (1954) 499-504. See Romilly, *A Fragment on the Constitutional Power and Duty of Juries Upon Trials for Libels* (1784) 14: When the Star Chamber fell, "some of the judges in Westminster Hall were of opinion that an opportunity offered, not only of extending the practice and the jurisdiction of their court over an object in some degree new, but of encroaching at the same time on the province of the jury".

[5] The constitutional importance of Zenger's acquittal is amply documented. Gouverneur Morris called it "the germ of American freedom, the morning star of that liberty which subsequently revolutionized America." Rutherford, *John Peter Zenger* (1904) 131. And "the verdict of this jury has been called 'the greatest victory encompassed in America by the democratic spirit before the signing of the Declaration of Independence and the one that made all others possible.'" Heartman, *John Peter Zenger* (1934) 60. See also Chafee, *Freedom of Speech and Press* (1955) 40; Chenery, *Freedom of the Press* (1955), Ch. VI; Corwin, *Freedom of Speech and Press Under the First Amendment*, 30 Yale Law Journal 48, 51 (1920); Hervey and Kelley, *Some Constitutional Aspects of Statutory Regulation of Libels on Government*, 15 Temple University Law Quarterly 453, 465 (1941); Note: *Constitutionality of the Law of Criminal Libel*, 52 Columbia Law Review 521, 524 (1952). Roger Williams was banished from Massachusetts for the crime of disseminating "newe and dangerous opinions, against the aucthoritie of magistrates". 1 Shurtleff, *Records of the Governor and Company of the Massachusetts Bay, 1628-1686* (1853-54) 160.

The reaction to the long years of censorship and punishment of critical speech, which had been building up in the American colonies throughout the eighteenth century, finally burst into revolutionary expression toward its end; and then, in 1791, the United States adopted their Bill of Rights, which included the speech and press guarantees of the First Amendment to the Constitution.[6]

Of controlling significance is the ensuing history of the brief American experience with a Sedition Law, which "wrecked the Federalist party" and thereafter "made Sedition Acts unthinkable".[7] It may safely be said that no other national legislative enactment has aroused such violent opposition, or left so clear-cut a popular verdict of its invalidity.

The first person to be indicted under the Sedition Act was Congressman Matthew Lyon of Vermont. He was charged with having endeavored "to stir up sedition and to bring the President and Government of the United States into contempt" for having said that John Adams had "an unbounded thirst for ridiculous pomp", and for expressing surprise at the fact that Congress had not issued "an order to send him to the mad house". He was sentenced to prison for four months and to pay a fine of $1000. Wharton, *State Trials* (1849) 333-34, 339.

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[6] Even in England, in the following year, Parliament enacted Fox's Libel Law, which, by recognizing the jury's right to return a general verdict of not guilty in criminal-libel trials, removed all limitations on the jury's function in such cases. 32 Geo. III, c. 60.

[7] Chafee, *Free Speech in the United States* (1954) 27; 2 *Cooley's Constitutional Limitations* (8th ed., 1927) 900; Nelles and King, *Contempt by Publication in the United States*, 28 Columbia Law Review 401, 406 (1928).

Anthony Haswell, editor of a Vermont newspaper, printed an advertisement addressed "to the enemies of political persecutions in the western district of Vermont", to raise money to pay Lyon's fine. In the advertisement, Haswell referred to the United States marshal holding Lyon as "a hard-hearted savage". He was thereupon indicted for sedition, and Justice Patterson who had presided over the trial of Lyon, charged the jury that they must find Haswell guilty if they found that his "intent was defamatory". He was fined $200 and imprisoned for two months. *Id.*, at p. 684, 685-86.

Dr. Thomas Cooper, a Pennsylvania editor, was indicted under the Sedition Law for attacking the President with a statement that Mr. Adams "had not yet interfered . . . to influence the decisions of a court of justice". He was convicted and sentenced to pay a fine of $400, and to serve six months in prison, following Justice Chase's charge to the jury that "if a man attempts to destroy the confidence of the people in their officers . . . he effectually saps the foundation of the government". *Id.*, at p. 679.

James Thompson Callender, author of *The Prospect Before Us*, was indicted for "libel" under the Sedition Act for having stated that President Adams "was a professed aristocrat and had proved faithful and serviceable to the British interest" in sending Marshall, Pinckney and Gerry to France. William Wirt, as counsel for Callender, argued to the jury that if they believed the Sedition Law to be unconstitutional, they must find the defendant not guilty. Justice Chase ordered Wirt to sit

down, and instructed the jury, in a charge reminiscent of that given in the trial of John Peter Zenger sixty-five years earlier, that if they found the fact of utterance, they must find the defendant guilty. *Id.*, at p. 718.

Citation of such cases could be multiplied. Suffice it to say that President Adams himself urged the institution of such prosecutions, and even went so far as to suggest that the editor of the Republican Party's organ, *The Aurora*, ought to be deported because of its "uninterrupted stream of slander on the American government". Letters to Pickering, July 24 and August 1, 1799, 9 Adams, *Works* (1854) 3, 5.

As Federalist judges invoked the Sedition Law to throttle criticism of their party's administration, the Kentucky and Virginia legislatures adopted protesting resolutions drawn, respectively, by Thomas Jefferson and James Madison.

The Kentucky Resolutions declared that, under the First Amendment to the Constitution, "libels, falsehood and defamation, equally with heresy and false religion, are withheld from the cognizance of Federal tribunals, (and) that therefore the (Sedition) act of the Congress of the United States, passed on the 14th of July, 1798 . . . which does abridge the freedom of the press, is not law, but is altogether void and of no force". 4 *Elliott's Debates* (1836) 566-67.

The following month, Virginia echoed these sentiments in even stronger terms, charging that the Sedi-

tion Act "exercises . . . a power not delegated by the constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto; a power, which more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." 4 *Elliott's Debates* (1836) 554-55.

In his ensuing *Report on the Virginia Resolutions*, the "Father of the Constitution", who had literally drafted the First Amendment with his own hand,[8] set forth that "in the United States, the great and essential rights of the people are secured against legislative, as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws." 4 *Elliott's Debates* (1836) 572, 597.

Madison continued with his celebrated justification for his stand, quoted with approval by this Court in *Near vs Minnesota*, 283 US 697, 718 (1931): "Some

[8] See Gay, *James Madison* (1898) 84; 3 Brant, *James Madison* (1950) *passim*; Chafee, *Free Speech in the United States* (1954) 19.

degree of abuse is inseparable from the proper use of everything; and in no instance is this more true, than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by anyone who reflects that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity, over error and oppression; who reflect, that to the same beneficent source, the United States owe much of the lights which conducted them to the ranks of a free and independent nation; and which have improved their political system into a shape so auspicious to their happiness. Had 'Sedition Acts,' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press; might not the United States have been languishing at this day, under the infirmities of a sickly confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?" *Id.*, at p. 598.

Madison's Report, which received the explicit approval of the Virginia House of Delegates,[9] concluded that "the article of the amendment, instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged.

[9] Journal of the House of Delegates of the Commonwealth of Virginia, 1799-1800 Session, page 72, January 7, 1800.

was meant as a positive denial to Congress, of any power whatever on the subject . . . that an exercise of any such power, would be manifest usurpation . . . that no power whatever over the press, was supposed to be delegated by the Constitution, as it originally stood, and that the amendment was intended as a positive and absolute reservation of it." *Id.*, at pp. 598-99.

To the rhetorical question: "Is then the federal government . . . destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libellous attacks which may be made on those who administer it?", the Report replied that "the constitution alone can answer this question. If no such power be expressly delegated, and if it be not both necessary and proper to carry into execution an express power, above all, if it be expressly forbidden, by a declaratory amendment to the constitution, the answer must be that the federal government is destitute of all such authority. . . . The question does not turn either on the wisdom of the constitution, or on the policy which gave rise to its particular organization. It turns on the actual meaning of the instrument by which it has appeared that a power over the press is clearly excluded, from the number of powers delegated to the federal government." *Id.*, at p. 600.

When, later, a resolution to repeal the second section of the Sedition Act came on for consideration in the House of Representatives, John Marshall, then recently

elected to that body from Virginia, cast the decisive vote for repeal. As stated by Beveridge: "Taking into account the prominence as a Federalist leader which Marshall had now achieved, his vote against the reprobated section of the Sedition Law was a supreme act of independence of political ties and party discipline. He had been and still was the only Federalist to disapprove, openly, the Alien and Sedition Laws." 2 *Life of John Marshall* (1944) 451.

While the foregoing resolution became involved in parliamentary maneuvers under which it never became effective (see *Annals*, 6th Cong., 1st Sess., Jan., 1800, 404-25), the Sedition Law lapsed into oblivion with Jefferson's accession to the Presidency; and all convicted offenders were pardoned "because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image". Letter to Mrs. John Adams (1804), 8 *Writings of Jefferson* (Ford ed., 1897) 309.

Criminal-libel prosecutions then fell into general disfavor and desuetude in this country, and even (at least following adoption, in 1843, of Lord Campbell's Libel Act admitting the defense of truth) in England.

As expressed by Professor Corwin: "In the long run the protest against the Sedition Act accomplished two results: It laid to rest the idea of a national common law of seditious libel of which the act was merely declaratory; while within the States, it rendered prose-

cution for political libels less and less frequent until they ceased altogether, leaving officials dependent for their protection on the ordinary law of slander and libel." *Freedom of Speech and Press Under the First Amendment*, 30 Yale Law Journal 48, 51 (1920). And see Chafee, *Free Speech in the United States* (1954) 18; 2 *Cooley's Constitutional Limitations* (8th ed., 1927) 898.

The few abortive federal prosecutions for political comment assertedly defamatory, are collected in Justice Jackson's dissent in *Beauharnais vs Illinois*, 343 US 250, 289-90 (1952). It has long since become the settled policy of the United States Government not to prosecute under the District of Columbia's criminal-libel law for criticism of government officials, because such prosecutions "would constitute embarrassment not consistent with our support of freedom of the press". *Letter of June 11, 1940 from Attorney General Robert H. Jackson to Senator Millard E. Tydings*, quoted in 87 *Cong. Rec.* 5836-37.

Criminal-libel statutes, considered largely to have fallen into obsolescence during the nineteenth century throughout the United States, have recently been revived and employed as sedition acts for prosecution of asserted defamation of public officials.[10]

This would seem to be persuasive indication that, of the traditional justifications for such proceedings,

[10] "The criminal libel cases of the present day indicate, however, that this almost obsolete action is being used by the authorities as a form of reprisal against those who criticize misconduct in office." Note: *Constitutionality of the Law of Criminal Libel*, 52 Columbia Law Review 521, 533 (1952).

preservation of magistrates from seditious utterances, rather than preservation of the peace, still prevails, which it evidently did in the case at bar, as the real motivating factor for criminal-libel actions.

It may fairly be stated that "under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation. . . . Criminal libel, when resorted to, can only result in suppressing unpopular expression. It would not be greatly different in its impact than employment of the law of seditious libel."[11]

As the preceding quotation indicates, it is the uniform view of constitutional writers, based on the *Zenger* trial, the historical developments in the struggle for free speech at the turn of the eighteenth century. the fact that prosecutions for criminal libel were the chief means employed for suppression of publications when the Bill of Rights was adopted, and the protests against, and the fate of, the Sedition Law, that it was the intention of the framers of the First Amendment that "both censorship and seditious libel are rejected. and prosecutions for criticism of the government, without direct incitement to law-breaking, are made impossible in the United States". Kelly, *Criminal Libel and*

[11] Emerson. *Toward a General Theory of the First Amendment*, 72 Yale Law Journal 877, 924 (1963). "Criminal prosecutions for libels can never be necessary to preserve the public tranquility". Wortman, *Political Enquiry and the Liberty of the Press* (1800) 253.

Free Speech, 6 Kansas Law Review 295, 310 (1958). Accord: Edmunds, *Struggle for Freedom* (1946) 100-103.

Dean Pound states that "in one English case a man said that a certain Justice of the Peace was a buffle-headed fellow, and he was prosecuted for that as a misdemeanor, and convicted. It was that sort of thing that led the Colonies, just as soon as they could make a frame of government for themselves, to put these provisions with reference to the liberty of the press in their Bill of Rights." *The Origin and Development of the Bill of Rights,* in the Newspaper-Radio Committee's *Freedom of the Press* (1942) 96.

In his *Liberty of the Press in the American Colonies* (1905), Schuyler similarly traced the historical evolution of our First Amendment guarantees: "The press in all the colonies early assumed a position of antagonism to the constituted authority, and in return the government took every opportunity to hurt it by means of prosecutions in the courts or inquisitorial proceedings before the Governor and his Council. It is interesting to note however that these proceedings lost almost all their terrors as the period of the Revolution approached, for the press received more and more the support of the people, who learned to appreciate the wide circulation which the newspaper gave to the new doctrines; thus we constantly find the grand juries refusing to find true bills against the printers, in this way reducing the Governor to the use of Informations which were looked on with suspicion by the people and seldom resulted in a verdict of Guilty." Page 75.

Judge Cooley agrees that "an examination of the controversies which have grown out of the repressive measures resorted to for the purpose of restraining the free expression of opinion will sufficiently indicate the purpose of the guaranties which have since been secured against such restraints in the future. Except so far as those guaranties relate to the mode of trial, and are designed to secure to every accused person the right to be judged by the opinion of a jury upon the criminality of his act, their purpose has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . If we are correct in this, it would not be in the power of the State legislature to pass laws which should make mere criticism of the constitution or of the measures of government a crime, however sharp, unreasonable, and intemperate it might be." 2 *Constitutional Limitations* (8th ed., 1927) 885, 901-902.[12]

Limitation of constitutional protection to communication of matters of public concern, while defensible in

[12] "Except in time of war . . . the American newspaper press, then, may be said to be confirmed in the right to criticize public officials and their acts. . . . This freedom was the field on which the historical combats for freedom of the press were fought. It is the right to criticize the government that has been championed in every great defense of free speech and a free press." Johnson, *Freedom of the Newspaper Press*, 200 Annals of the American Academy of Political and Social Science 60, 64 (1938). Accord: Smith, *Freedom's Fetters* (1956) 431; Chafee, *Free Speech in the United States* (1954) 18, 21, 149-52.

theory, would, it is submitted, be dangerous in practice; since such a qualification, like the "good motives" test discussed at page 43 below, would lend itself to evasion of, in the guise of compliance with, the protective principle.

The only way in which speech can be protected adequately against governmental restriction, is by striking down all statutes whose aim is punishment of speech as defamation, particularly when the statute is susceptible of invocation by those in power to avenge criticism of officers of government. Thus, "the prior balancing in favor of protecting expression, embodied in the First Amendment, here compels acceptance of the legal doctrine that criminal libel laws are invalid". Emerson, *Toward a General Theory of the First Amendment*, 72 Yale Law Journal 877, 924 (1963).

There is, after all, no difference in theory or effect between a "defamation" prosecution, and a "seditious libel" prosecution, for criticism of public officials. The accepted definition of "seditious libel" is simply "written censure upon public men for their conduct as such". 2 Stephen, *History of the Criminal Law of England* (1883) 348.[13]

[13] "A seditious libel was nothing but a publication that the government didn't like, it criticized the conduct of the government or some particular official." Pound, *The Origin and Development of the Bill of Rights*, in the Newspaper-Radio Committee's *Freedom of the Press* (1942), 93. "An attack on the dominant party was held by the courts to be a libel". Schuyler, *The Liberty of the Press in the American Colonies* (1905) 76. "Every one was a libeller who outraged the sentiments of the dominant party." 2 May, *Constitutional History of England* (1873) 244.

Ultimate constitutional rejection of such prosecutions in England was grounded on the principle that "the practical enforcement of this (seditious-libel) doctrine was wholly inconsistent with any serious public discussion of political affairs . . . and so long as it was recognized as the law of the land, all such discussion existed only on sufferance". 2 Stephen, *History of the Criminal Law of England* (1883) 348.

This principle obviously applies equally to prosecutions, under ordinary criminal-libel laws (if valid at all under the First Amendment), for seditious defamation of public officials in the United States.

In this country, the perils attributed to suppression of criticism of the official conduct of judges, especially when leveled by another government officer involved in the administration of justice, emerge sharply from the history of constitutional evolution in this area, from this Court's repeated reversals of contempt convictions for such criticism, and from reiterated expressions by members of this Court.

One of the most notorious free-speech incidents in the period which saw the adoption and quick repudiation of the Sedition Law, was the indictment of a Boston editor, in 1801, for calling Chief Justice Dana of Massachusetts "a tyrant judge" who administered "that execrable engine of tyrants, the Common Law of

England". See Warren, *History of the American Bar* (1911) 237.[14]

Hudon traces the abuses of the Sedition Law itself (*Freedom of Speech and Press in America* (1963) 48-55); and the story of early contempt convictions for criticism of authoritarian judges, culminating in the celebrated sentencing of Luke Lawless by Judge Peck, and the latter's ensuing impeachment, is outlined in Nelles and King, *Contempt by Publication in the United States*, 28 Columbia Law Review 401, 409-31 (1928).

In 1898, Mr. Justice Brewer made his famous statement that "it is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the object of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death." McNamara, *Ragbag of Legal Quotations* (1960) 274.

[14] Such libel prosecutions as this, and as *Respublica vs Oswald*, 1 Dall. 319 (Pa.-1788) and *Commonwealth vs Blanding*, 3 Pick. 304 (Mass.-1825), long antedated both the adoption of the Fourteenth Amendment, and this Court's holdings that that Amendment extended the First Amendment's prohibitions to State action; and accordingly, these decisions are no authority for a present day holding of constitutionality of State criminal-libel laws.

Although he dissented from this Court's contempt reversal in *Bridges vs California*, Mr. Justice Frankfurter made plain his recognition of the principle that "judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice, they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations, and of their ultimate public responsibility, by a vigorous stream of criticism expressed with candor however blunt." 314 US at 289.

Justice Murphy, concurring in the *Pennekamp* contempt decision, similarly pointed out that "judges should be foremost in their vigilance to protect the freedom of others to rebuke and castigate the bench, and in their refusal to be influenced by unfair or misinformed censure. Otherwise freedom may rest upon the precarious base of judicial sensitiveness and caprice. And a chain reaction may be set up, resulting in countless restrictions and limitations upon liberty." 328 US at 370.

And in its latest contempt decision, which involved the attempted punishment of criticism of a group of judges by the local sheriff, this Court took occasion to emphasize the doctrine that "the role that elected of-

ficials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance". *Wood vs Georgia*, 370 US 375, 395 (1962).

In holding that the State of Louisiana may evade the constitutional safeguards in this case, the Supreme Court of that State relied mainly on the reference, in this Court's opinion in *Beauharnais vs Illinois*, to "libelous utterances not being within the area of constitutionally protected speech". 343 US 250, 266 (1952). See R 139-40, 143; 154 So.2d at 414, 416-17.

It is submitted that on the basis of the historical precedents discussed herein, as well as for the reasons stated in the dissenting opinions in the *Beauharnais* case itself, the decision of that case is inconsistent with the First Amendment's guaranty of freedom of speech.[15]

[15] "The First Amendment repudiated seditious libel for this country. I think the First Amendment, with the Fourteenth, 'absolutely' forbids such laws without any 'ifs' or 'buts' or 'whereases.' Whatever the danger, if any, in such public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech." Black, J., dissenting in *Beauharnais vs Illinois*, 343 US at 272, 275. "The First Amendment is couched in absolute terms—freedom of speech shall not be abridged . . . . There is room for regulation of the ways and means of invading privacy. No such leeway is granted the invasion of the right of free speech guaranteed by the First Amendment. . . . The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty. They chose liberty. . . . It is true that this is only one decision which may later be distinguished or confined to narrow limits. But it represents a philosophy at war with the First Amendment". Douglas, J., dissenting, *Ibid.*, 343 US at 285, 287.

In any event, it hardly seems arguable that by the quoted *dictum* this Court meant to turn its back on 700 years of protest and 170 years of constitutional evolution, and to open the floodgates to unrestricted sedition prosecutions in the guise of criminal-libel trials.

In fact, the *Beauharnais* opinion itself makes clear that the unprotected "libelous utterances" to which reference is made, are restricted to "epithets or personal abuse"—"utterances (which) are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality". 343 US at 256-57.

Further, and of particular consequence in the instant connection, the opinion in *Beauharnais* is careful to announce that the group criminal-libel law at issue in that case could not be applied, free of constitutional limitations, to "libels of political parties"; since "political parties, like public men, are, as it were, public property". 343 US at 263, in footnote.[16]

In like manner, when this Court later held that "obscenity is not within the area of constitutionally pro-

[16] Chafee has similarly pointed the distinction between prosecution for socially valueless abuse of private individuals, and "punishing words because they express ideas which are thought to cause a future danger to the State". *Free Speech in the United States* (1954) 149. And see Berns, *Freedom, Virtue & The First Amendment* (1957) 152: "Beauharnais was not punished for anything he said, printed or believed about the federal government, the State of Illinois, the City of Chicago, or any of their officials; the statute was not a sedition act. He was punished for what he said about other private citizens, over six hundred thousand of them."

tected speech or press", it was careful to distinguish between unprotected pornography on the one hand, and "material which does not treat sex in a manner appealing to prurient interest" on the other [*Roth vs United States*, 354 US 476, 485, 488 (1957)]; the latter type of expression falling squarely under the shelter of "the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment".[17]

The suggestion that the State has an interest in the preservation of private reputations, which it is entitled to protect by criminal-libel laws, has been the subject of abstract postulation. See Note: *Constitutionality of the Law of Criminal Libel*, 52 Columbia Law Review 521, 528-33 (1952). However, no court has ever acknowledged the existence of such an interest; and it is obvious that if it were to be accorded judicial recognition, subject to protection by criminal process against criticism of public officials, that would mean the end of free speech in this country, since effective criticism is inevitably injurious to the reputation of the official involved.

The far higher constitutional interest in unfettered expression on matters within the public domain must prevail over any interest of the State in the defense of the good name of its officials.

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[17] Quoting from *Thornhill vs Alabama*, 310 US 88, 101-102 (1940). Italics in original. The expression "matters of public concern", as there used, is apparently not employed in its literal sense, but rather to distinguish it from the "utterances (which) are no essential part of any exposition of ideas" criticized in *Beauharnais vs Illinois*, 343 US 250, 257 (1952).

This Court's opinion in the *Beauharnais* case refers to the concept of a state interest in shielding its citizens' sensibilities from defamation; but the opinion leaves no doubt that its propelling rationale was not the protection of individual reputations, but rather the real and immediate danger of civil disorder and social upheaval from unduly inflammatory and baseless appeals to racial prejudice. See 343 US at 254, 258-64.

2—*At All Events, Criticism of Judges May Not Constitutionally be Punished Without Trial by Jury, and Without Regard For the Clear-and-Present-Danger Test*

This Court has repeatedly held that statements critical of judges may not be punished through contempt-of-court procedures, if no clear and present danger to the administration of justice is posed,[18] especially if the person who published the statement is himself a public official concerned with the administration of justice. *Wood vs Georgia*, 370 US 375, 394-95 (1962). Appellant relied primarily on these decisions in support of his alternative position in this case.

The Supreme Court of Louisiana rejected the authority of this Court's decisions on the ground that appellant was charged with defamation, not contempt of court; that "Louisiana treats defamation and contempt as separate offenses"; that, accordingly, "it is un-

[18] *Craig vs Harney*, 331 US 367 (1947); *Pennekamp vs Florida*, 328 US 331 (1946); *Bridges vs California*, 314 US 252 (1941).

necessary for us to consider the issues behind the phrase 'Clear and Present Danger' "; and that "defendant's contention that LSA-RS 14:47-50 fail to provide the procedural safeguard of a trial by jury is without merit". R 143, 144; 154 So.2d at 416, 417.

In *New York Trust Co. vs Eisner*, 256 US 345, 349 (1921), Justice Holmes said that "a page of history is worth a volume of logic"; but these holdings of the Court below cannot be justified by either logic or history.

As a matter of logic, it seems evident that the constitutional protection of criticism of the official conduct of judges, which this Court has long since established in its contempt decisions, would be worthless if a State could circumvent that protection, and convict a citizen for criticism of judges, without a jury trial and without regard for the clear-and-present-danger test, simply by calling the proceeding a criminal-libel, rather than a contempt-of-court, prosecution.

The illogic of such a result is emphasized by the admitted absence from this case, of any threat to the proper disposition of pending litigation, which this Court has held to be the only plausible ground for punishment of judge-criticism even by contempt process (see *Bridges vs California*, 314 US at 271). In its opinion below, the Supreme Court of Louisiana conceded explicity that "defendant's expressions set out in the Bill of Information are not criticisms of a court

trial or of the manner in which any one of the eight judges conducted his court when in session." R 145; 154 So.2d at 417-18.

Existing statutory and judicial limitations on use of the summary contempt power to punish out-of-court criticism of a judge, are based, at least in part, on the concept that the threat of summary trial, conviction and punishment by the judge for such criticism, constitutes a form of prior restraint on freedom of speech, and cannot be reconciled with the prohibitory standards established by the First Amendment. *Cf.* Nelles and King, *Contempt by Publication in the United States*, 28 Columbia Law Review 401, 402, 526-27 (1928).

This threat can be avoided only by permitting such trial—whether in terms for contempt or for defamation—only by a jury, and by permitting conviction only subject to the clear-and-present-danger test.

History affords no better basis than logic for distinguishing between punishment of judge-criticism by contempt and by criminal-libel prosecution, or for denying, in the latter, the constitutional safeguards which protect the former. Not only have contempt and criminal-libel processes evolved concurrently as governmental devices for the suppression of publicly critical speech,[19] but, as demonstrated under Point 1

[19] "Contempt by publication often comes very close to seditious libel. In fact, seditious libel at common law included publications calculated to excite disaffection towards the administration of justice." Nelles and King, *Contempt by Publication in the United States*, 28 Columbia Law Review 401, 406 (1928). See footnote 13 above, and accompanying text.

of this *Argument* above, criminal-libel statutes are actually the older, and more common resort, of these twin enemies of the citizen's right to complain of official misconduct.

Prosecution of both contempts of court and political libels, along with censorship, were all entrusted to the Court of Star Chamber during its régime. Hudon, *Freedom of Speech and Press in America* (1963) 9-10; Fox, *The King v. Almon*, 24 Law Quarterly Review 266 (1908).

Just as the original design of the statute *De Scandalis Magnatum* was to punish "political scandal" (see page 13 above), so the original purpose of the contempt power was likewise "to keep a blaze of Glory around (courts and judges), and to deter people from attempting to render them contemptible in the eyes of the public."[20]

Indeed, both this ground and the later rationalization that punishment for contempt is necessary to preserve the due administration of justice, are still advanced to this day as justifications for contempt actions. As late as 1941, this Court had occasion to state in a contempt case, that "the substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and

[20] Wilmot, *Notes of Opinions and Judgments* (1802) 270. Undelivered Judgment in *The King vs Almon*, 97 ER 94 (1765). The influence of this undelivered opinion on the development of the law of contempt is traced by Sir John Fox in his *History of Contempt of Court* (1927), Chapter II.

disorderly and unfair administration of justice." *Bridges vs California*, 314 US 252, 270.

A parallel evolution also took place in the criminal-libel and contempt areas as to the right to trial by jury. Contempts by utterance had originally been triable by jury in the common-law courts; but when contempt prosecutions returned to those courts on demise of the Star Chamber, the latter's summary non-jury process was carried over into the common-law contempt procedure. Fox, *The King v. Almon*, 24 Law Quarterly Review 266, 268-70 (1908).

In light of these historical developments, Nelles and King, in their leading discussion on *Contempt by Publication in the United States*, 28 Columbia Law Review 401, 406 (1928), rightly concluded that "insofar as a popular reaction which for 118 years made Sedition Acts unthinkable may be assimilated to adjudication of their unconstitutionality, it may seem also to have established the unconstitutionality of punishing libels of courts as contempts"—a proposition endorsed by this Court (subject to the clear-and-present-danger test) thirteen years later, in *Bridges vs California*, 314 US 252.

While the decisions rendered thus far by this Court have concededly not embraced the full scope of the submission under Point 1 of this *Argument*, two principles have been established with clarity in this field.

The first is that, "although jury trial in criminal libel cases may not be guaranteed by the Sixth Amendment

as reflected in the Fourteenth", it must be placed among the constitutional protections of free speech "ensured by the embodiment of the First Amendment in the Fourteenth". Since criminal-libel prosecutions are now used chiefly "by the authorities as a form of reprisal against those who criticize misconduct in office", "to deprive the jury of its traditional power in criminal libel trials is . . . dangerous. Freedom of expression, protected today by the First and Fourteenth Amendments, requires retention of the eighteenth century rule that no one shall be punished for publishing a libel without having had the opportunity to convince a jury that the matter published was not libelous."[21]

And, by common consent, the constitutional protections to be afforded persons who are prosecuted for political criticism, also include the great substantive safeguard of the clear-and-present-danger test.[22]

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[21] Note: *Constitutionality of the Law of Criminal Libel*, 52 Columbia Law Review 521, 532-33 (1952). "There is convincing evidence that at the end of the eighteenth century freedom of discussion was thought to demand jury trial in criminal libel cases. Included in this evidence is the passage in England of Fox's Libel Act of 1792, the influence upon colonial feeling of the jury's action in acquitting Zenger in 1735, and the provision made for jury determination of issues of law and fact in early state constitutions as well as the Sedition Act of 1798." *Ibid.* Accord: 2 *Cooley's Constitutional Limitations* (8th ed., 1927) 885; Deutsch, *Freedom of the Press and of the Mails*, 36 Michigan Law Review 703, 711 (1938). Also to be noted is the federal statute requiring jury trials in prosecutions for contempt of court by publication, given effect in *Nye vs United States*, 313 US 33 (1941). This Court again emphasized the jury question in reversing a contempt conviction in *Craig vs Harney*, 331 US 367, 373 (1947).

[22] Kelly, *Criminal Libel and Free Speech*, 6 Kansas Law Review 295, 321-25 (1958). "By applying this stringent rule since late in the 1930s, the Supreme Court has struck down each challenged interference wherever the legislation was specifically directed against the content of the utterance. This has

Sir James Stephen submitted, eighty years ago, that "every member of the public who censures the ruler for the time being, exercises in his own person the right which belongs to the whole of which he forms part. He is finding fault with a servant. To those who hold this view fully, and carry it out to all its consequences, there can be no such offense as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb or property, and there may be incitements to such offenses. But no imaginable censure of government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal."[23]

If this has been the constitutional law of England for more than eighty years, it would be anomalous to a degree, particularly in light of the long struggle against criminal prosecutions for political libel which culminated in the adoption of the First Amendment itself, if a State could convict and punish a citizen for criticizing public officials, without trial by jury and without regard for the clear-and-present-danger rule, merely by labeling its prosecution "Criminal Libel" instead of "Contempt of Court" or "Sedition".[24]

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been true in legislation involving either prior restraint or subsequent punishment." Note: *Clear and Present Danger Re-examined*, 51 Columbia Law Review 98, 99-100 (1951).

[23] 2 *History of the Criminal Law of England* (1883) 299-300. Holdsworth affirms that this "is now the accepted view" in England. 8 *History of English Law* (1925) 337.

[24] "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly and petition than the people of Great Britain had ever enjoyed." *Bridges vs California*, 314 US 252, 265 (1941). To the same effect: *Grosjean vs American Press Co.*, 297 US 233, 248-49 (1936). "The great initial problem in this realm of consti-

This Court has applied the clear-and-present-danger rule in testing the constitutionality of convictions for offensive speech under anti-picketing statutes,[25] as it has under federal laws designed to preserve the security of the Republic itself.[26]

And of particular significance, this Court has twice reversed convictions for breach of the peace, on the ground that the asserted breach was an exercise of free speech, protected by the Fourteenth and First Amendments in the absence of any clear and present danger of resultant disorder.

In *Cantwell vs Connecticut*, this Court reversed such a conviction on a common-law count, and declared it obvious "that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions"; and went on to hold that "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of

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tutional liberty was to get rid of the common law of 'seditious libel' which operated to put persons in authority beyond the reach of public criticism." Corwin, *Liberty Against Government* (1948) 157. See Madison, *Report on the Virginia Resolutions*, 4 *Elliott's Debates* (1836) 572. 596-99, and text following note 8 *supra*.

[25] *Thornhill vs Alabama*, 310 US 88, 104-105 (1940).

[26] *Schenck vs United States*, 249 US 47, 52 (1919); *Hartzel vs United States*, 322 US 680, 687 (1944).

the common law offense in question." 310 US 296, 308, 311 (1940). To the same effect, *State vs. Klapprott*, 127 NJL 395, 22 A2d 877 (1941).

Presented, ten years later, with a conviction for statutory breach of the peace by communication of ideas, this Court again reversed, on the ground that "freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest". *Terminiello vs Chicago*, 337 US 1, 4 (1949).

Given these precedents, anomaly would be compounded if a state were entitled to by-pass the First-Amendment bulwarks, in placing a public official on trial for criticizing other public officials, simply by laying its charge under its ordinary criminal-defamation statute.

The Supreme Court of Louisiana emphasized in its opinion in this case, this Court's refusal to apply the clear-and-present-danger rule in the group-libel case of *Beauharnais vs Illinois*. But, as demonstrated under Point 1 of this *Argument*, *Beauharnais*, to the extent that it may retain authority at all, has no precedential force in a case involving criticism of the official conduct of officers of government.

3—*Statutory Provision For the Defense of Truth Without Malice Does Not Render Constitutional the Application of the Louisiana Defamation Statute in This Case*[27]

Appellant's conviction for defamation of public officials in a statement on a matter of significant public interest, cannot be upheld by reference to the provision of Louisiana's defamation law, making truth without malice a defense to a charge of violation thereof. RS 14:48, quoted on page 3 above. This defense is not a valid alternative to the constitutional right of free speech, nor even to the shelter afforded by the clear-and-present-danger rule.

In the first place, all thoughtful writers agree that this traditional defense is rendered illusory by tying its availability to the presence of good motives or the absence of malice: "To make good motives for justifiable ends the test of the lawfulness of truth published on a matter of public concern is to cut off allowable argument and debate, and to deprive the public of the educational benefit of the publication. In addition to this legal reason, there is the practical reason of the great danger, illustrated by the prosecutions under the federal Sedition Act, that men will be fined and imprisoned, under the guise of being punished

[27] The question whether provision for the defense of truth with good motives is a constitutionally legitimate substitute for the clear-and-present-danger test was not raised or decided in the *Beauharnais* case. The clear-and-present-danger question was not reached at all (343 US at 266), and the only question presented or discussed as to the defense of truth, was whether the appellant had satisfied the statutory requirements for invoking the defense (343 US at 265-66).

for their bad motives, or bad intent and ends, simply because the powers that be do not agree with their opinions." 2 Schofield, *Essays on Constitutional Law and Equity* (1921) 540.[28]

It seems equally clear, in the second place, that the defense of truth would be just as illusory, even if the absence of malice were not a condition of the defense. "Truth", although a theoretical absolute, is, in realistic perspective, simply too subjective, too relative a concept to satisfy the constitutional requirements, especially in the shadowy zone of mingled fact and opinion within which criticism of public officials invariably falls.

The constitutional protection of free speech would be of little value, if it extended only to statements of fact which are subject to positive demonstration by proof acceptable in a court of law, and if it extended only to expressions of ideas and opinions which majority sentiment, in the person of a judge (or even in the persons of jurors), is already prepared to accept. No constitutional protection is necessary for statements which fall in these categories.

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[28] "Any criticism disliked by a court can too easily be labeled 'for bad motives' and punished in spite of the defense of truth. This was the case in the *Beauharnais* decision." Kelly, *Criminal Libel and Free Speech*, 6 Kansas Law Review 295, 328 (1958). "Nothing can be more difficult than to pronounce with certainty upon the sincerity of the man who may have misstated the transactions of Government. How can it be ascertained what portion of actual Malevolence and how much of mistaken Zeal, existed within his mind?" Wortman, *Political Enquiry and the Liberty of the Press* (1800) 172-3. Accord: Madison, *Report on the Virginia Resolutions*, 4 *Elliott's Debates* (1836) 572, 602; 2 *Cooley's Constitutional Limitations* (8th ed., 1927) 900.

The First Amendment is not needed, and was not designed, to protect such innocuous utterances; its purpose is to foster the expression of provocative criticism, and the propagation of contentious ideas—speech so dissentient as to require the shield of a constitution against punishment as heresy—whether or not the speaker can satisfy a judge that what he says is demonstrably "true".

To limit the free-speech guarantees to what the majority considers right, would be to hobble, not to aid, the search for truth, and thereby to defeat the whole beneficent purpose of the first article of the Bill of Rights.

Rejecting the Sedition Act's defense of truth, Madison wrote: "But, whatever may have been the meritorious intentions of all or any who contributed to the Sedition Act, a very few reflections will prove that its baneful tendency is little diminished by the privilege of giving in evidence the truth of the matter contained in political writings. In the first place, when simple and naked facts alone are in question, there is sufficient difficulty in some cases, and sufficient trouble and vexation in all, of meeting a prosecution from the Government with the full and formal proof necessary in a court of law.

"But in the next place, it must be obvious to the plainest minds, that opinions and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves: . . .

and that opinion, and inferences, and conjectural observations, cannot be subjects of that kind of proof which appertains to facts, before a court of law." *Report on the Virginia Resolutions*, 4 *Elliott's Debates* (1836) 572, 602. Accord: Hortensius (George Hay), *An Essay on the Liberty of the Press* (1799) 43-49.[39]

In practice, the Sedition Act's defense of truth proved even more delusive than Madison had predicted. To the already formidable burden of proof under common-law rules of admissible evidence, unsympathetic judges

[39] "The mere right to show truth as a complete defense is, however, inadequate to preserve freedom of expression in the area of public comment. Because discussion of subjects of public interest commonly involves issues on which there is contradictory evidence and belief, the defense of truth is often extremely difficult to establish. The First Amendment, one of whose primary functions is to ensure opportunities for the democratic determination of public matters, seems therefore to demand that, with respect to the discussion of such matters, reasonable belief in the truth of what is published be made a complete defense. Finally, even the defense of reasonable belief is not always a sufficient safeguard of society's interest in this area. Since much of the comment on individual activities of public import is no more than an assertion of the publisher's opinion as to the moral overtones of underlying facts, the defense of reasonable belief in the truth of what is published is often inappropriate. Here the civil libel standard of 'fair comment', allowing a high degree of freedom of expression, might well be applied." Note: *Constitutionality of the Law of Criminal Libel*, 52 Columbia Law Review 521, 532 (1952). "In cases of this kind, it is submitted that the essential point is not the admission of truth as a defense but a consideration of whether the matter is public utterance, and if so, whether it presents a clear and present danger of a breach of the peace." Kelly, *Criminal Libel and Free Speech*, 6 Kansas Law Review 295, 332 (1958). "The prior balancing in favor of protecting expression, embodied in the first amendment, here compels acceptance of the legal doctrine that criminal libel laws are invalid. And this conclusion would stand whether truth is accepted as a complete defense or the standard remains in its present form." Emerson, *Toward A General Theory of the First Amendment*, 72 Yale Law Journal 877, 924 (1963).

added the further burden of proving the truth "to the marrow", and even of proving the complete truth by the testimony of a single witness. See Hudon, *Freedom of Speech and Press in America* (1963) 53. This nation's prompt and vigorous repudiation of the Sedition Act, was a direct repudiation of the shibboleth that the defense of truth is an adequate safeguard of the right to speak out against official misconduct.

This Court has recognized, in its contempt decisions, that error is properly combatted, not by suppressing speech and incarcerating the speaker, but by "counter-argument and education". *Wood vs Georgia*, 370 US 375, 389 (1962).[30] Freedom of speech requires application of this principle in criminal-libel prosecutions as well.

Conclusion

Louisiana's criminal defamation statute is invalid as a denial of free speech under the First Amendment as embodied in the Fourteenth, especially when made the basis of a prosecution for seditious libel.

There is, in any event, no pretense that appellant's utterances posed any clear and present danger to any interest which the State of Louisiana is entitled to protect by criminal process at the expense of freedom of speech.

[30] "Comment on what a judge has done—criticism of the judicial process in a particular case after it has exhausted itself—no matter how ill-informed or irresponsible or misrepresentative, is part of the precious right of the free play of opinion. Whatever violence there may be to truth in such utterances must be left to the correction of truth." Frankfurter, J., dissenting, in *Craig vs Harney*, 331 US 367, 389 (1947).

The Supreme Court of Louisiana recognized expressly that appellant's statement—which could scarcely be considered more derogatory than those involved in this Court's *Pennekamp* and *Wood* decisions—presented no threat to the administration of justice; and there was obviously no clear and present danger of resort by the Judges to violent conduct to avenge appellant's affront to their dignity.

Even if prosecution for criminal defamation of judges were constitutionally permissible, and there was a question as to whether appellant's utterance posed a clear and present danger of bringing about a substantive evil which the State of Louisiana had a right to prevent, Louisiana's constitutional and statutory provisions under which appellant's request for trial by jury was denied, are invalid under the due-process clause of the Fourteenth Amendment embodying the First.

It is respectfully submitted that the attempted application of Louisiana's defamation statute in this case violated the First and Fourteenth Amendments to the Constitution, and that the judgment appealed from should be reversed.

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February, 1964.